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March 27, 2017

VIA ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room TW-A325  
Washington, DC 20554

Re: Reply Comment of Kenneth, Eisen & Associates, Ltd.  
Re: Petition for Rulemaking and Declaratory Ruling Regarding Prior Express  
Consent under the Telephone Consumer Protection Act of 1991  
(CG Docket Nos. 02-278 and 05-338)

Dear Ms. Dortch:

Kenneth, Eisen & Associates, Ltd. ("KEA") appreciates the opportunity to provide this reply comment regarding the Petition for Rulemaking & Declaratory Ruling of Craig Moskowitz & Craig Cunningham Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278, 05-338 (Jan. 22, 2017) (the "Petition"). KEA is a consumer and commercial accounts collection agency formed in 1992 and based in Phoenix, Arizona.

This reply comment responds to the following arguments asserted by those few parties supporting the Petition:

- a) that the term "prior express consent" necessarily requires written consent, which is otherwise appropriate, and
- b) that live calls are an appropriate solution for legitimate businesses.

One of the commenters argues that the language of the Telephone Consumer Protection Act ("TCPA") is clear, suggesting that the term "prior express consent" *requires* written consent.<sup>1</sup> This suggestion is belied by the language of the statute itself and the fact that, as many other commenters opposing the Petition note, the Federal Communications Commission's ("FCC") interpretation has

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<sup>1</sup> See Anderson + Wanca's Comments on Petition for Rulemaking & Declaratory Ruling of Craig Moskowitz & Craig Cunningham (CG Docket Nos. 02-278, 05-338), March 10, 2017, at 2.

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been consistent over the last 25 years.<sup>2</sup> Consequently, as another commenter explained, “[b]usinesses have built compliance models around this scheme for the past 25 years.”<sup>3</sup> To upset this compliance without a compelling reason would work undue hardship on legitimate businesses.

Importantly, as another commenter explains, the “TCPA was enacted to curb telemarketing abuses.”<sup>4</sup> In finding an appropriate balance between preventing offensive telemarketing calls and calls made by legitimate businesses to their customers, the FCC should continue to treat telemarketing separate from other calls, including calls from debt collectors to valid debtors. Activities designed to collect legitimate debts is an entirely valid business activity. Indeed, many businesses contract with separate businesses that specialize in debt collection. The vast majority of such businesses endeavor to conduct their business activities in compliance with applicable laws and in a manner respectful to debtors.

One commenter supporting the Petition suggests that the solution is live calls.<sup>5</sup> For non-telemarketing calls, including calls by debt collectors for legitimate debts, it is not always efficient for those callers to make live calls. As ACA International notes, modern calling technology “allows for a timely, cost effective, and reliable way for consumers to learn about their accounts and arrange for payment in a way that manually dialing does not.”<sup>6</sup> With such technology available, live calling is inefficient for those conducting legitimate business.

The FCC should continue to distinguish between telemarketers making unsolicited and automated calls versus legitimate businesses contacting their customers. By failing to make this distinction, legitimate businesses are already subjected to crippling class action litigation by opportunistic plaintiffs’ attorneys who extract legal fees while providing little or no benefit to consumers. Permitting the action requested by the Petition would only increase the opportunities for class action litigation under the TCPA.

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<sup>2</sup> See, e.g., Comments of Alpha Media, LLC, Emmis Communications Corporation, Entercom Communications Corp., iHeartMedia, Inc., Minnesota Public Radio, and Radio One, Inc. (CG Docket Nos. 02-278, 05-338), March 10, 2017, at 2-8.

<sup>3</sup> *Id.* at 11. See also Comments of U.S. Chamber of Commerce in conjunction with the U.S. Chamber Institute for Legal Reform (CG Docket Nos. 02-278, 05-338), March 10, 2017, at 3 (“American businesses have relied for decades on the consistent guidance from the FCC: ‘prior express consent’ for transactional and informational calls exists when a customer opts to provide his or her cellular telephone number to a company.”).

<sup>4</sup> Comments of the Student Loan Servicing Alliance (SLSA) and the SLSA Private Loan Committee (SLSA PLC), CG Docket No. 02-278, March 10, 2017 at 2 (citing S. Rep. No. 102-178, at 1969 (1991)). See also Dissenting Statement of Commissioner Ajit Pai Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, at 1.

<sup>5</sup> See Comments of Diana Mey (CG Docket Nos. 02-278, 05-338), March 10, 2017, at 4.

<sup>6</sup> Comments of ACA International (CG Docket Nos. 02-278, 05-338), March 10, 2017, at 13.

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KEA appreciates the opportunity to provide this reply comment. If you have any questions or need additional information, please contact me.

Sincerely,

**FREEMAN MATHIS & GARY, LLP**

/s/ Matthew N. Foree

John H. Goselin II, Esq.

Matthew N. Foree, Esq.

*Counsel for Kenneth, Eisen & Associates, Ltd.*